United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-6134 B

NED MILLER and FRANCES MILLER,

Plaintiffs-Appellants,

-against

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

P/S

APPELLANTS' REPLY BRIEF

FREDERICK & GOGLIO
Attorneys for Plaintiffs-Appellants
Office & Post Office Address
167 Willis Avenue
Mineola, New York 11501
Telephone: (516) 248-8806

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-3626

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NED MILLER and FRANCES MILLER,	:	
Plaintiffs- Appellants,	:	
-against-	:	NO. 75-6134
UNITED STATES of AMERICA,	:	
Defendant-Appellee	:	

APPELLANTS' REPLY BRIEF

1. The appellee's brief constitutes an obvious attempt to assign to the 1957 transaction (the only transaction in issue on this case) those facts which relate only to the 1955 transaction. The trial court made the same error.

2. The trial court's obvious misconstruction of the events is seen in the memorandum decision (R123a) in which is clearly stated:

> "Mr. Miller, the chief executive officer of both Realty and Stormguard, clearly intended to have the Realty check (this is the 1957 check) discharge his obligation to Stormguard (this is the 1955 transaction)."

The trial court's erroneous conclusion is made manifest by the fact that a search of the record demonstrates that there is no evidence in the record to support the above

quoted conclusion. On the other hand such evidence as there is on the subject contradicts the conclusion. Thus at Tr. 39

> "Q. Was it correct to say, sir (Ned Miller, cross-examination) that in 1957, looking at the time that you received this check (referring to the 1957 Realty check) that so long as -- that is, your investment in Pittsburgh Properties stood, that you had no intention at that time of repaying the $65,000 to the realty corporation or to Stormguard?
>
> A. That isn't true. I was repaying it as I went along. I was making payments" (Tr. 30-40, emphasis supplied)."

3. Although the Trial Court concluded appellant Ned Miller intended the Realty check to discharge his obligation to Stormguard (A 123a) the Stormguard note for $65,000 was a demand note with interest at 2-1/2% (A 118a). It is inconsistent for the Trial Court to find no note, find no repayment schedule and at the same time find that Mr. Miller had in fact given a note "payable on demand." A demand note fixes its own repayment schedule.

The Trial Court also found that Mr. Miller intended the Realty check to discharge his obligation to Stormguard (A 118a). Yet, Mr. Miller continued making the interest payments called for by the demand note (A 121-123a). Certainly, if Mr. Miller was so devious

as to be able to create the situation here at issue, i.e. a simulated embezzlement by Rausch, he would not be paying interest on an obligation which had been discharged! Yet, so the Trial Court concluded! " *** the court concludes that repayment was not contemplated by the parties." (A 124a)

4. The arbitrary nature of the revenue agent's conclusion that the 1957 check represented a repayment of the 1955 loan (A 115a) was conclusively rebuttled by the testimony of Milton Seitman to the effect that the revenue agent after audit disallowed two years of interest payments and declared the Realty check a dividend without any supporting evidence (55a et seq.)

It is important to note that the Trial Court in its earlier opinion had held as follows:

> "Although the 1957 Realty check was intended by Miller to discharge his outstanding indebtedness to Stormguard, Rausch failed to give Mr. Miller credit for the Realty check on Stormguard's books; specifically, after the Realty check was transferred to Stormguard, Stormguard's loan account continued to show that Mr. Miller had an outstanding indebtedness of $65,000." (119a)

It is impossible to rationalize the two inconsistent findings by the Trial Court. At an earlier time this Trial Court had found that the 1957 Realty check did

not serve to clear the Stormguard intedebteness. Today the Trial Court finds the exact opposite. Both findings were made on the same evidence! In fact, the evidence showed that Mr. Miller intended naught that the Government and the Trial Court have contended for.

The evidence does show that both the 1955 and the 1957 transactions were part of Rausch's improper manipulations (119a). Nothing else explains Rausch's curious act of issuing a Stormguard check to Mr. Miller in 1957 for $65,000, entering that check in an exchange account and not in the Stormguard loan account, and then leaving that check in his desk drawer undelivered and un-negotiated and even unsigned (Ex 2, 62a, 48a-52a).

5. The appellee's brief discloses the mixture of the 1955 transactions with the 1957. Neither the Trial Court's decision nor the appellee's brief demonstrate why these two unrelated transactions are considered together with the 1955 Stormguard Transaction used to explain this Trial Court's conclusion against appellant. Rausch's role is almost completely ignored. Both the Trial Court's opinion and the Government's brief deal with the two transactions (1955 and 1957) as if Rausch was a complaisant employee and Miller the originator and director of the various manipulated transactions.

On page 4 of appellee's brief, the statement appears that Mr. Miller was told by Rausch that the terms of the loan (presumably the 1955 loan) were to continue as before, i.e. that Mr. Miller would still owe Realty $65,000 at 2-1/2% interest payable on demand and that Mr. Miller understood that by such transaction that he had repaid a $65,000 loan to Stormguard. A reading of Mr. Miller's testimony demonstrates that Mr. Miller was not so naif.

The record does not support the foregoing conclusion by appellee and accepted by the Trial Court. As a matter of fact, Mr. Miller testified that he entered into the transaction involving the $65,000 Realty check because Rausch told him that he had to do it that way, and that he did whatever Rausch told him to do. Nowhere in the record is there any evidence that Mr. Miller intended the $65,000 Realty check to discharge his obligation to Stormguard. As a matter of fact, Mr. Miller's testimony was as follows:

> "You confuse me very badly at the time. And all I know, is, at this point the -- I am telling you that the man told me that this was a transfer of some kind, and that I had to do it that way and I did what he told me to do" (33a)

Appellee's brief refers to the Trial Court's finding as follows: (Appellee's brief, page 5)

> "On the basis of this evidence, the District Court found that taxpayer did not intend to repay the $65,000 which Realty had paid to him (R 119a), determined the $65,000 check constituted a dividend from Realty to taxpayer and entered judgment in favor of the United States."

Although the Trial Court came to its conclusion, and did so contrary to the evidence in the record, candor required the Appellee to refer to the record properly. The evidence developed from a reading of Mr. Miller's pre-trial deposition was as follows and highlights the trial court's error:

> "'Q. Reading now from page 17:
>
> "Question: I am referring to a document which I believe your attorney, Mr. Frederick, has brought with him this morning. This is a document dated June third, 1955.
>
> At the top it says $65,000 on demand. Hereafter I promise to pay to the order of Miller Stormguard Corporation $65,000 at 'interest at 2-1/2 percent per annum.' Is this your signature, sir?"
>
> "Answer: Yes, sir.
>
> "Question: It says 'Ned Miller'.
>
> "Answer: Right.
>
> "Question: This interest at 2-1/2 percent, how is that determined, what interest rate were you to pay on this?
>
> N Miller-redirect

"Answer: Mr. Rausch told me this was the proper rate to put down. Whatever he told me, I did."

Were you asked those questions and did you give those answer?

A Yes.'"

MR. FELDMAN: I ask counsel to concede that the documents referred to in the section just read is now Defendant's Exhibit A in evidence.

"MR. ADLER: Yes.

BY MR. FELDMAN; (on redirect)

Q Reading again from page 18:

"Question: At the time that you made this loan and signed the note and the letter of June third, 1955, what was your understanding as to how long this note was to remain outstanding?

"Answer: Well, I had hoped to pay it off in a few years at the most. In fact I did make payments back from time to time. He would call me for money and I gave him monies.

"Question: Did you make the payments of the principal on this loan?

"Answer: I gave him everything he asked me. He asked me for monies on account. At one time it even took the form of interest or principal, and he told me how much he wanted, and I gave it to him. I cold you, at one time I issued a check that I took from a savings bank, a cashier's check, and turned it over to the company, endorsed it over to the company for part payment of whatever was due.

"Question: How much was that check for?

"Answer: I don't know. It was a number of thousands of dollars. I can't remember exactly. It was quite a substantial check."

Were you asked those questions and did you give those answers?

A Correct sir. (35a-37a emphasis supplied)

It is respectfully submitted that the trial record does not support the Appellee's brief or the District Court's determination. The record does disclose that both Appellee and the District Court were improperly using the evidence of the 1955 transaction as evidence that the 1955 transaction controlled the 1957 transaction. The law would require that the 1957 transaction be treated on its own. This was not done here.

CONCLUSION

It is respectfully submitted that the Appellee's brief has failed to demonstrate any error in Appellant's brief; does not dispute Appellant's argument on the law; and fails to demonstrate from the record the validity of the District Court's determination.

For the reasons mentioned, it is respectfully submitted that the judgment of the District Court should be reversed and the matter remanded to the District Court

for judgment in favor of the Appellant on the law and on the facts.

Respectfully submitted,

FREDERICK & GOGLIO
Attorneys for Appellants

IRVING FREDERICK, of counsel
LEONARD FELDMAN, of counsel

SERVICE OF 2 COPIES OF THE WITHIN

Reply Brief

IS HEREBY ADMITTED.

DATED: April 13, 1976

Paula Gardemore

Attorney for

STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL RODERICK being duly sworn deposes and says: On APRIL 13, 1976 I served the within ~~record on appeal~~ brief ~~appendix~~ on SCOTT P. CRAMPTON ASST ATTORNEY GENERAL the attorney for the respondent ~~herein~~ by ~~leaving~~ mailing three copies thereof at his office located at TAX DIVISION DEPT. OF JUSTICE WASHINGTON D.C. 20530

Michael Roderick
MICHAEL RODERICK

Sworn to before me
this 13 day of
APRIL, 1976

Lillian Weisberg

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976

RECEIVED
U.S. ATTORNEY
APR 13 3 03 PM '76
EAST. DIST. N.Y.

Paula Gardemore